

First Published in The Wichita Eagle on July 29, 2011

ORDINANCE NO. 49-045

AN ORDINANCE OF THE CITY OF WICHITA, KANSAS, GRANTING TO CARGILL MEAT SOLUTIONS, INC., THE RIGHT AND PRIVILEGE TO CONSTRUCT, OPERATE, AND MAINTAIN A SECOND FIBER OPTIC TELECOMMUNICATION SYSTEM IN THE CITY OF WICHITA, KANSAS, AND PRESCRIBING THE TERMS OF SAID GRANT.

WHEREAS, The City of Wichita is the owner of certain public right-of way; and

WHEREAS, Cargill Meat Solutions, Inc., hereinafter referred to as “Cargill,” desires to use certain public right-of-way of the City of Wichita for the purpose of construction, maintenance, and operation of a fiber optic telecommunication system pursuant to the provisions of the laws of the State of Kansas; and

WHEREAS, the City of Wichita finds such use to be in the public interest and is willing to enter into an agreement to allow Cargill to use the public right-of-way for such purpose;

NOW THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS:

SECTION 1. **Definitions.** For purposes of this ordinance, the following words and phrases shall have the following meanings given herein:

“Cargill” or “Company” – Cargill Meat Solutions, Inc.

“City” – The City of Wichita, Kansas

“Cargill Facilities” – Telephone and telecommunication lines, conduits, wires, cables, pipes, poles, towers, vaults, and appliances, either under or above ground.

“Public improvement” – Any existing or contemplated public facility, building, or capital improvement project, including without limitation, streets, alleys, sidewalks, sewer, water, drainage, right-of-way improvement, and public projects.

“Public project” – Any project planned or undertaken by the City or any governmental entity for construction, reconstruction, maintenance, or repair of public facilities or public improvements, or any other purpose of a public nature.

“Right-of-Way” – Present and future streets, alleys, rights-of-way, and public easements, including easements dedicated in plats of the City of Wichita, Kansas.

SECTION 2. **Grant.** This ordinance shall pertain to Cargill’s construction, maintenance, and operation of Cargill Facilities for a fiber optic telecommunication system in the City in, through and along that right-of-way which is part of the route described in Attachment “A” hereto as contemplated by this ordinance on a non-exclusive basis for the full term hereof; subject, however, to the terms and conditions herein set forth.

The grant under this ordinance specifically excludes the right to provide local “telephone exchange service” as defined by 47 U.S.C. § 153(47) and open video systems or cable service as defined by the Telecommunications Act of 1996 to customers within the City, and further excludes the right within the City to provide local telecommunications services for a fee directly to the public or to such classes of users as to effectively make it available directly to the public. In the event that Cargill shall in the future provide such service or derive revenue from such service within the City of Wichita, Cargill shall apply to the City for the right and privilege to provide such service in accordance with the laws of the State of Kansas. Cargill represents that at the present time it is not providing such excluded services in the City of Wichita and has no expectation of providing such services.

SECTION 3. **Use of Right-of-Way.** In the use of right-of way under this ordinance, Cargill shall be subject to all rules, regulations, policies, resolutions and ordinances now or hereafter adopted or promulgated by the City in the reasonable exercise of its police power and is subject to all applicable laws, orders, rules and regulations adopted by governmental bodies now or hereafter having jurisdiction. In addition, Cargill shall be subject to all rules, regulations, policies, resolutions, and ordinances now or hereafter adopted or promulgated by the City relating to permits and fees, sidewalk and pavement cuts, utility location, construction coordination, beautification, and other requirements on the use of the right-of-way and shall comply with the following:

- (a) Cargill’s use of right-of-way shall in all matters be subordinate to the City’s use of the right-of-way for any public purpose. Cargill shall coordinate the placement of the Cargill Facilities in a manner which minimizes adverse impact on public

improvements, as reasonably determined by the City. Where placement is not otherwise regulated, the Cargill Facilities shall be placed with adequate clearance for such public improvements so as not to impact or be impacted by such public improvement

- (b) All earth, materials, sidewalks, paving, crossings, utilities, public improvements, or improvements of any kind injured or removed by Cargill in its activities under this ordinance shall be fully repaired or replaced promptly by Cargill at its sole expense and to the reasonable satisfaction of the City or any other adjacent owner thereof.
- (c) All Cargill Facilities constructed, reconstructed, or relocated in the right-of-way after the date hereof shall be placed underground unless otherwise agreed to by the City, and in steel conduit if located in the right-of-way and in rigid conduit if otherwise located on City owned property within the corporate limits of the City.
- (d) Cargill shall keep and maintain accurate records and as-built drawings depicting accurate horizontal and vertical location of all Cargill Facilities constructed, reconstructed, or relocated in the street right-of-way after the date hereof. All points of facilities shall be horizontally located from street centerline, or section or quarter section lines or corners. Vertical locations on all points of Cargill Facilities shall consist of elevations in either City datum or United States Geological Survey datum.
- (e) Prior to construction, reconstruction or relocation of any Cargill Facilities in the right-of-way, Cargill shall submit to the City Engineer for approval, plans and specifications of the proposed installation. Such approval shall not be unreasonably withheld, delayed or conditioned.
- (f) For a Public Project, Cargill shall cooperate promptly and fully with the City and take all measures necessary to provide accurate and complete information regarding the nature and locations, both horizontal and vertical, of the Cargill Facilities located within right-of-way when requested by the City or its authorized agents for a public project. Such location and identification shall be at the sole expense of Cargill, without expense to the City, its employees, agents or authorized contractors. Cargill shall have a person familiar with the Cargill

Facilities who is responsible for timely providing information satisfying information needs of the City and other users of the right-of-way.

- (g) For a Public Project, Cargill shall promptly relocate or adjust any Cargill Facilities located in the right-of-way for a public project. Such relocation or adjustment shall be performed by Cargill, at its sole expense, without expense to the City, its employees, agents, or authorized contractors and shall be specifically subject to rules and regulations of the City not inconsistent with this ordinance pertaining to such.
- (h) It shall be the sole responsibility of Cargill to take adequate measures to protect and defend the Cargill Facilities in the right-of-way from harm or damage. If Cargill fails to accurately or timely locate the Cargill Facilities when requested, it has no claim for costs or damages against the City and its authorized contractors, or any other party authorized to be in the right-of-way, except to the extent such party is responsible for the harm or damage caused by its negligence or intentional misconduct.
- (i) Cargill shall notify the City not less than three (3) working days in advance of any construction, reconstruction, repair, or relocation of the Cargill Facilities which would require any street closure which reduces traffic flow to less than two lanes of moving traffic. Except in the event of an emergency, as reasonably determined by Cargill, no such closure shall take place without such notice and prior authorization from the City. The City shall follow its policies in the grant or denial of such authority, which shall not be unreasonably delayed. In addition, all work performed in the traveled way of the right-of-way, or which in any way impacts vehicular or pedestrian traffic shall be properly signed, barricaded, and otherwise protected. Such signing shall be in conformance with the latest edition of the Federal Highway Administration's Standards and Guideline for Work Zone Traffic Control, unless otherwise agreed to by the City.
- (j) All technical standards governing construction, reconstruction, installation, operation, testing, use, maintenance, and dismantling of the Cargill Facilities in the right-of-way shall be in accordance with applicable present and future federal, state, and City law and regulation, including but not limited to the most recent

editions of the National Electrical Code, the National Electrical Safety Code, and the Fiber Optic Cable Installation Standard of the Telecommunications Industry Committee, or such substantive equivalents as may hereafter be adopted or promulgated. It is understood that the standards established in this paragraph are minimum standards and the requirements established or referenced in this ordinance may be additional to or stricter than such minimum standards.

- (k) Cargill shall not lease or sublease (including, but not limited to, the lease of conduit space) or otherwise make available any of the Cargill Facilities in the right-of-way to any other entity without the express written consent of the City. The purpose of this provision is to allow and encourage the sharing of space in the right-of-way so long as sub-lessees or users are authorized by the City to use the right-of-way.

Nothing in this section is intended or shall be interpreted to eliminate Cargill's right to use the right-of-way for the purposes of this ordinance.

**SECTION 4. Indemnity and Hold Harmless.** Cargill shall hold and save the City, its officers, employees, agents, and authorized contractors on public improvements, harmless from and against all claims, damages, expense, liability, and costs including reasonable attorney's fees, which may be occasioned by Cargill in any manner, solely or in part, by Cargill's occupancy of the right-of-way, except to the extent otherwise specified in paragraph 3(h). In the event a claim shall be made or an action shall be instituted against the City growing out of such occupancy of the right-of-way by the Cargill Facilities, then upon notice by the City to Cargill, Cargill will assume liability for the defense of such actions at Cargill's cost, subject to the option of the City to appear and defend such actions, at its own cost.

**SECTION 5. Payments and Charges.** The payments herein provided shall be in lieu of all other licenses, taxes, charges, fees or impositions, except that the usual general property taxes and special ad valorem property taxes, permits and fees including charges for pavement cuts or other charges based on restoring the premises to their same condition, or charges outside the scope of the ordinance which are not in any way connected with telecommunications business, as such, will be imposed on Cargill, and are not covered by the payments herein.

**SECTION 6. Compensation to City.** Cargill shall pay to the City as compensation for the right and privilege granted in this ordinance a one-time fee in the amount of One Thousand and no/100 Dollars (\$1,000), payable on the effective date of this ordinance. In addition, Cargill shall pay an annual sum in the amount of Two and 50/100 Dollars (\$2.50) per linear foot for the right-of-way described in Attachment "A". Such annual payments shall be made on the anniversary date of the effective date each year thereafter. All payments shall include an additional charge of one and one-half percent (1 ½%) per month compounded daily retroactive to the date payment was due when made more than thirty days (30) after the due date. The City and Cargill may hereafter establish such periodic payment procedure as the parties mutually agree.

**SECTION 7. Attachment to Facilities.** Nothing in this ordinance shall be construed to require or permit any telephone, electric light or power wire attachments by either the City or Cargill on the facilities of the other. If such attachments are desired by the City or Cargill, then a separate non-contingent agreement shall be prerequisite to such attachments.

**SECTION 8. Forfeiture of Grant and Privilege.** In case of failure on the part of Cargill, its successors and assigns, to comply with any of the provisions of this ordinance, or if Cargill, its successors and assigns, should do or cause to be done any act or thing prohibited by or in violation of the terms of this ordinance, Cargill, its successors and assigns, shall forfeit all rights and privileges granted by this ordinance and all rights hereunder shall cease, terminate and become null and void, provided that said forfeiture shall not take effect until the City of Wichita shall carry out the following proceedings. Before the City proceeds to forfeit said ordinance, as in this section prescribed, it shall first serve a written notice upon Cargill, setting forth in detail in such notice the neglect or failure complained of, and Cargill shall have ninety days (90) thereafter in which to comply with the conditions of this grant and privilege. If at the end of such ninety-day period the City deems that the conditions have not been complied with and that the ordinance is subject to cancellation by reason thereof, the City shall enact a repealing ordinance setting out the ground upon which said grant and privilege is to be canceled or terminated. If within thirty days (30) after the effective date of said repealing ordinance, Cargill shall have not instituted an action, in the Eighteenth Judicial District Court in Sedgwick County, Kansas, to

determine whether or not Cargill has violated the terms of this ordinance and whether or not Cargill has is subject to cancellation by reason thereof, this ordinance shall be cancelled and terminated at the end of such thirty-day period. If within such thirty-day period, Cargill does institute an action, as above provided, to determine whether or not Cargill has violated the terms of this ordinance and that the ordinance is subject to cancellation by reason thereof and prosecutes such action to final judgment with due diligence, then, in that even, in case the court finds that the ordinance is subject to cancellation by reason of the violation of its terms, this ordinance shall terminate thirty days (30) after such final judgment is rendered. PROVIDED, however, that the failure of Cargill to comply with any of the provisions of this ordinance or the doing or causing to be done by Cargill of anything prohibited by or in violation of the terms of this ordinance shall not be a ground for the forfeiture thereof when such act or omission on the part Cargill is due to any cause or delay beyond the control of Cargill, its successors and assigns, or to bona fide legal proceedings.

**SECTION 9. Rights and Duties of Grantee upon Expiration of Ordinance.** Upon expiration of this ordinance, whether by operation of law, by lapse of time, by agreement between Cargill and the City, or by forfeiture thereof, Cargill shall have the right to remove from the right-of-way any and all of the Cargill Facilities within a reasonable time after such expiration, but in such event, it shall be the duty of Cargill immediately upon such removal, to restore the right-of-way from which said Cargill Facilities are removed, to as good condition as the same were before said removal was effected.

**SECTION 10. Term and Termination Date.** This ordinance shall be and remain in full force and effect for a period of five (5) years from the effective date thereof, unless sooner terminated as herein provided. Cargill is granted the option to renew the rights granted in this ordinance for two (2) additional five (5) year terms subject to the re-negotiation of the provisions including compensation. Cargill shall give notice of the exercise of the option at least six (6) months prior to the expiration of the term. The renewal is subject to the provision of Section 16.

**SECTION 11. Right to Assign.** The rights granted by this ordinance inure to the benefit of Cargill, and any parent, subsidiary, affiliate or successor entity now or hereafter existing. The

rights shall not be assignable without the express written consent of the governing body of the City, except Cargill may assign its rights under this ordinance to a parent, subsidiary, affiliate or successor entity without such consent. Any required consent is to be evidenced by an ordinance or resolution of the governing body of the City that fully recites the terms and conditions, if any, upon which consent is given.

SECTION 12. **Force Majeure.** Each and every provision hereof shall be subject to Acts of God, fires, strikes, riots, floods, war and other causes beyond Cargill's control.

SECTION 13. **Invalidity of Ordinance.** If any clause, sentence, or section of this ordinance shall be held to be invalid, it shall not affect the remaining provisions of this ordinance.

SECTION 14. **Effectiveness and Acceptance of Ordinance.** This ordinance shall not take effect or become in force until it shall have been read in full at three (3) regular weekly meetings of the governing body of the City of Wichita nor until and immediately after its final passage it shall be published in the official city paper once each week for two (2) consecutive weeks, and such ordinance shall not take effect or be in force until and after the expiration of sixty (60) days from the date of its final passage, nor if, pending the final passage and taking effect of said ordinance, an election shall be called as provided by law, in which event said ordinance shall not take effect or become in force until the same shall have been duly approved by the electorate.

Within sixty (60) days after the final passage and approval of this ordinance, Cargill shall file with the City Clerk of the City of Wichita its acceptance in writing of the provisions, terms and conditions of this ordinance, which acceptance shall be duly acknowledged before some officer authorized by law to administer oaths; and when so accepted the ordinance and acceptance shall constitute a contract between the City and Cargill subject to the provisions of the laws of the State of Kansas.

PASSED AND APPROVED by the City Council of the City of Wichita, Kansas this 26th day of July, 2011.



ATTEST:

CARL BREWER

---

Mayor

KAREN SUBLETT

---

City Clerk

APPROVED AS TO FORM:

GARY E. REBENSTORF

---

Director of Law